Novato Healthcare Center *and* National Union of Healthcare Workers (NUHW-CNA). Case 20–CA–168351

September 29, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On April 20, 2017, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed a cross-exception and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that under all of the circumstances here, the Respondent unlawfully interrogated employee Narvius Metellus when Director of Staff Development Gay Rocha asked him how he intended to vote in the upcoming representation election. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).[4] Our dissenting colleague correctly observes that an employer may, under certain limited circumstances, lawfully ask an open and active union supporter general questions about the union. But the Board

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

There are no exceptions to the judge's dismissal of the complaint allegation that the Respondent threatened employees with unspecified reprisals if they elected the Union to represent them.

We affirm the judge's finding that credible testimony from the General Counsel's witnesses establishes that none of the Respondent's employees on station four on the morning of October 7, 2015, slept while on duty—as opposed to while on break. In so finding, we do not rely on the judge's statement that Director of Nutritional Services Teresa Gilman testified that perhaps 20 minutes passed between the time she looked at her car clock and the time she first approached station four that morning. Rather, we agree with the judge's additional finding that Gilman's detailed testimony establishes that she might have first approached station four after 4:10 a.m., and thus might have observed employees sleeping while on break.

[2] We agree with the judge's conclusion that, under *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), the General Counsel satisfied his initial burden to prove that employees' union activity was a motivating factor in the Respondent's decision to suspend and discharge them by showing union activity, the Respondent's knowledge of union activity, and the Respondent's animus against union activity. The General Counsel is not required to "demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301, fn. 10 (2014), enfd. sub nom. *AutoNation v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

Chairman Miscimarra disagrees. He notes that in *Wright Line* itself, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. Accordingly, Chairman Miscimarra believes the General Counsel must establish a link or nexus between the employee's protected activity and the employer's decision to take the challenged adverse employment action. See, e.g., *Tschiggfrie Properties, Ltd*, 365 NLRB No. 34, slip op. at 1 fn. 1 (2017) (Miscimarra). Applying this standard here, Chairman Miscimarra finds the General Counsel made the requisite showing.

In affirming the judge's finding that employees engaged in protected union activity, we find it unnecessary to rely on *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), cited by the judge, a case that involved nonunion protected concerted activity. Additionally, in affirming the judge's finding that the Respondent bore animus towards employees' protected union activity, we find it unnecessary to rely on the Respondent's inclusion of its labor consultants in its decision to suspend and discharge them.

[3] We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language and substitute a new notice to conform to the Order as modified.

Chairman Miscimarra notes that in the remedy section of the judge's decision, adopted by his colleagues, the judge ordered the Respondent to compensate the discriminatees for any search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, in accordance with the Board majority's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). For the reasons stated in his separate opinion in *King Soopers*, slip op. at 12–16, Chairman Miscimarra would adhere to the Board's former approach of treating search-for-work and interim employment expenses as an offset against interim earnings.

The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

[4] We do not rely on any implication in the judge's decision that an employer's questioning of open and active union supporters about their union sentiments, in the absence of threats or promises, is per se coercive. See *Rossmore House*, above, at 1177–1178 (overruling *PPG Industries*, 251 NLRB 1146 (1980)).

has long recognized that questions like Rocha's—going specifically to how an employee himself intends to vote—have a uniquely coercive tendency. See, e.g., *Royal Laundry*, 277 NLRB 820, 830 (1985) ("The Board jealously guards the secrecy of the voting booth."); see also *Phillips 66 (Sweeny Refinery)*, 360 NLRB 124, 128 (2014) (distinguishing lawful general questions about union activity from specific coercive inquiries about employees' own opinions). Rocha's position as a high-level management official with no regular working relationship with Metellus compounded the coercive tendency of her question. See *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 3 (2016). And Rocha's subsequent comments that voting for the Union would have implications on Metellus's pay and that the Union could possibly take part of his paycheck clearly communicated the Respondent's preference that Metellus should vote against representation. Under these circumstances, as well as those discussed by the judge, we find that Rocha's question reasonably tended to restrain, coerce, or interfere with Metellus's rights under Section 7, and accordingly violated Section 8(a)(1) of the Act.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Novato Healthcare Center, Novato, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Suspending, discharging, or otherwise discriminating against any employees because of their or any other employees' support for the National Union of Healthcare Workers (NUHW-CNA) or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Novato, California facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms

[5] Applying the totality of the circumstances test set forth in *Rossmore House*, above, Chairman Miscimarra would not find that Rocha unlawfully interrogated Metellus. Rather, the Chairman would find that Rocha simply sought to engage Metellus in a lawful conversation about the union campaign. The Board has long recognized that such back-and-forth exchanges between employer representatives and open and active union supporters, like Metellus, are not coercive. *Rossmore House*, above at 1178. Metellus wore prounion regalia to work for weeks, and he was openly wearing prounion regalia at the time of the conversation with Rocha. Given the circumstances surrounding the conversation, the Chairman does not believe Metellus could reasonably suppose that Rocha's question was designed to elicit information from which Rocha might take action against him or any other employee. See *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) (questioning not coercive where it did not reasonably appear questioner was seeking to obtain information in order to take adverse action against employees). Indeed, Metellus immediately and truthfully replied to Rocha's question, stating that he planned to vote for the Union and did not care about the union dues coming out of his pay. Cf. *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1009 (2003) (question "which way did you vote" not coercive when asked of open union supporter who did not hesitate to answer truthfully). Finally, the question's casual delivery and informal setting—in passing in the hallway by the vending machines—underscores its non-coercive character. See, e.g., *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1225 (2002) (casual atmosphere weighs in favor of finding questioning non-coercive).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 29, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you because any of you support the National Union of Healthcare Workers (NUHW-CNA) or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Rolando Bernales, Ar-

lene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez, and WE WILL, within 3 days thereafter, notify them in writing that we have done so and that we will not use the suspensions and discharges against them in any way.

NOVATO HEALTHCARE CENTER

The Board's decision can be found at www.nlrb.gov/case/20-CA-168351 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Marta Novoa, Esq., for the General Counsel.
Richard Albert, Esq., Kamran Mirrafati, Esq., and *Kimberly Klinsport, Esq.,* for the Respondent.
Benjamin J. Siegel, Esq., Heather Conger, Esq., and *Latika H. Malkani, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in San Francisco, California, from August 15 through 18, September 8, and October 17, 2016. The National Union of Healthcare Workers (NUHW-CNA) (Charging Party, Union or NUHW) filed the original charge on January 22, 2016, and the first amended charge on February 18, 2016, and the General Counsel issued the complaint and notice of hearing on March 29, 2016, and amended complaint on August 1, 2016. Novato Healthcare Center (Respondent or Employer) filed timely answers to the complaint, and amended complaint. At the hearing, the General Counsel motioned to amend the complaint for a second time which I granted over Respondent's objection.

The General Counsel alleges the following:

(1) On or about October 4, 2015,[1] Respondent, by Gay Rocha (Rocha) at Respondent's facility interrogated its employees about their union sympathies;
(2) On or about October 6, Respondent, by Diane McClain (McClain) at Respondent's facility threatened its employees with unspecified reprisals if employees elected the Union to represent them;
(3) About October 7, Respondent suspended employees Rolando (Rolly) Bernales (Bernales), Arlene Waters Brown (Brown), Narvius Metellus (Metellus), Angel (Lea) Sabelino (Sabelino), and Gonzala Rodriguez (Rodriguez) and
(4) About October 12, Respondent terminated employees Bernales, Brown, Metellus, Sabelino, and Rodriguez.

The complaint and amended complaints continue that by engaging in the conduct described above in (1) and (2), Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act (the Act) thereby violating Section 8(a)(1) of the Act. The complaint and amended complaints further allege that by engaging in the conduct described above in (3) and (4), Respondent discriminated against its employees thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

As discussed below, I find that Respondent violated the Act when Darron Treude (Treude) suspended and terminated Bernales, Brown, Metellus, Sabelino, and Rodriguez. In addition, Rocha unlawfully interrogated Metellus but I find that the General Counsel failed to prove that McClain threatened Sabelino.

On the entire record,[2] including my observation of the demeanor of witnesses,[3] and after considering the briefs filed by the General Counsel, Charging Party, and Respondent,[4] I make the following.

General Credibility Conclusions

Prior to setting forth my findings of facts which will address credibility resolutions in specific events, I will set forth my general credibility conclusions of the main witnesses for each party. All allegations in this complaint may only be resolved by assessing witness credibility. Credibility determinations may rely on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014), citing *Double D Construction Group, Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB

[1] All dates, hereinafter, are 2015 unless otherwise indicated.

[2] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: Transcript (Tr.) 119, Line (L.) 2, 7: the speaker is "the interpreter," not "Mr. Albert"; Tr. 164, L. 2, Tr. 214, L. 17: "where" should be "wear"; Tr. 173, L. 20: "midi" should be "mid"; Tr. 221, L. 12: "here" should be "hear"; Tr. 434, L. 19: "thee" should be "the"; Tr. 612, L. 17: "schema" should be "subpoena"; Tr. 615, L. 15: "not" should be "note"; Tr. 625, L. 5, 11, 19: the speaker is "Siegel" not "Mirrafati." In addition, throughout the record, the gender of Metellus is incorrectly identified as "she" rather than "he."

[3] Although I have included several citations to the evidentiary record in this decision to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for the General Counsel's exhibit; "CP Exh." for Charging Party's exhibit; "Emp. Exh." for Employer's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "CP Br." for Charging Party's brief; and "R. Br." for Respondent's brief.

622, 623 (2001). Additionally, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

A critical factor in this complaint is the timing of events the night of October 6 to 7 which led to the suspension and termination of 5 employees. Respondent suspended and fired 5 employees, 4 of whom were active union supporters, only 1 week before the representation election. Of course, the witnesses' testimonies differed as to when specific events that evening occured but overall, the General Counsel's witnesses' testimonies remained consistent with specific details that lead me to conclude that their collective version of events is more accurate than Respondent's witnesses' testimony. The other two allegations of this complaint involve complete denials that the events took place. In evaluating the different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities; corroboration or lack thereof; consistencies or inconsistencies within the testimony of the witnesses and between the witnesses when testifying about the same event. See, e.g. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Any testimony in contradiction to my findings has been considered but rejected.

Respondent's administrator Treude testified nervously, evasively, and provided vague and contradictory answers. He often responded that he could not recall and could not remember salient facts. Most significantly, Treude failed to be forthcoming in Respondent's position regarding union representation of its employees. Treude, despite his vague responses to queries regarding the labor consultants, clearly took a major role in opposing organizing in Respondent's workplace. Treude's actions of handing out flyers, telling employees to attend the labor consultants' meetings, and other proactive functions contradicts his position at the hearing that he really did not know what the labor consultants were doing at Respondent. Even more obvious, his supervisors wore lanyards which advocated for voting "No" in the union election. Treude's testimony created the impression that he sought to hide his true intentions. Due to this lack of candor, I cannot accept Treude's testimony in whole.

Along with Treude, I cannot credit the testimony of Teresa Gilman (Gilman). Gilman's testimony simply appeared implausible. Gilman claimed to perform a number of functions all within a very short time period of 10 to 15 minutes but then claimed that Bernales, Brown, Sabelino, Metellus, and Rodriguez were allegedly sleeping for a much longer period of time without ever looking at a clock. First, Gilman initially claimed it only took her 10 to 15 minutes from 3:50 a.m. to complete the following tasks: finish driving to work, rebooting her computer, checking her emails, reviewing her kitchen logs and checking her refrigerator labels, going to the break room, using the restroom, removing flyers from the break room, reviewing these same flyers, and placing them on her desk. Later, Gilman admitted that this sequence of events could have actually taken 15 to 20 minutes, putting her start time for rounding after 4:10 a.m. Moreover, Gilman claimed that she could not believe that all the employees were sleeping on station 4 but not once did she ask the employees in the other stations whether sleeping was permissible. Gilman never tried to wake the station 4 employees either. Not once did Gilman check the time to see how much time elapsed. In addition, Gilman did not call Treude or Florinda Nobleza (Nobleza), the director of nursing, immediately to report her findings.

Gilman, though, took time to take one picture of two of the sleeping employees for evidence even though she was not sure if her actions were appropriate. Respondent argues that the time stamp on that photo corroborates her testimony regarding timing (R. Br. at 15–16). As discussed below I did not consider the photo with the time stamp as the time stamp was added well after the decision to suspend and terminate the discriminatees. Furthermore, even assuming that the photo was taken at 4:21 a.m., the photo alone does not establish that it had been 15 to 20 minutes since she began rounding. In fact, based on Gilman's testimony, her rounding began after 4:10 a.m., and could have been within the 10 minute window of the employee break period.

Simply, Gilman's actions made little sense when Respondent's mantra is safety for its patients. Furthermore, Gilman appeared to recall significant details on how the employees slept such as their body positions and if they used pillows, but could not recall seeing any union lanyards or pins on the employees' clothes. Moreover, Gilman initially testified that she did not wear an antiunion lanyard but later via stipulation stated that she had worn these lanyards along with other supervisors. Combining Gilman's actions upon discovering that the employees were allegedly sleeping with her inconsistent and implausible testimony, I do not find her testimony credible and reject her version of events completely.

Ultimately, I credit the testimony of Bernales, Brown, and Metellus. Bernales, Brown, and Metellus testified credibly with their testimonies remaining consistent on direct and cross-examination.[5] Although the discriminatees estimated the timing of events and did not look at the clock to confirm the time as the events progressed, they consistently recalled details which consequently established a logical sequence of events. Furthermore, the testimonies of Bernales, Brown, and Metellus are not undermined by contradictory evidence. Specifically, Brown testified credibly, and spoke emphatically about patient safety when she testified that she only slept for 10 minutes, and ensured that Bernales and Metellus were not on break before she took her own break. I also found Metellus and Bernales to be quite credible. Their testimony about the sequence of events and corresponding timing made sense combined with the testimony of Brown. To further bolster his testimony, documentary evidence supports Bernales' testimony that he attended the labor consultants' meeting the morning of October 7 at 5:45 a.m., after Treude asked him about his breaks that morning.

As for Sabelino, I credit portions of her testimony but cannot rely upon her testimony completely as there were some implausible points which render her testimony partially credible. The points with which I do not find her credible are quite subtle but necessary in this credibility analysis where minutia is incredibly important. First I cannot rely on her testimony as to who

[5] Rodriguez did not testify.

she told she planned to take her 10 minute break. Metellus testified that Sabelino told him that she planned to take a break at the same time as Brown. As Brown, Metellus, Sabelino, and Bernales were all in or around the nurses' station at approximately 4 a.m., it seems unlikely that Sabelino only informed Brown that she planned to take her 10 minute break at the same time but instead more likely Sabelino told Metellus and Bernales of her break plans. Meanwhile, Bernales likely left around this time to answer the call light. Second, Sabelino could not recall a significant detail as to whether she told Treude that she took her 10 minute break which undermines her credibility. Third, Sabelino claims that Nobleza did not call her to schedule her investigatory interview but instead told Brown to inform Sabelino. This scenario is highly unlikely. Thus for these subtle and minor discrepancies, I partially credit the testimony of Sabelino simply because her testimony regarding specific events seemed unlikely.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California limited liability company with a facility located at 1565 Hill Road, Novato, California, operates a skilled nursing facility. During the calendar year ending December 31, 2015, Respondent, in conducting operations at the skilled nursing facility, derived gross revenues in excess of $100,000. Furthermore, Respondent, during this same time period while conducting operations at the skilled nursing facility, purchased and received goods, supplies, and materials valued in excess of $5000 directly from points outside the State of California. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND AND RESPONDENT'S ORGANIZATION

Respondent operates a 181-bed skilled nursing facility which provides care for approximately 170 patients or residents (Tr. 560–561).[6] Respondent employs approximately 200 employees, approximately 160 of whom are bargaining unit employees including certified nursing assistants (CNAs) and licensed vocational nurses (LVNs) or charge nurses (Tr. 561–562). Respondent organizes the facility into four stations or units: station 1, 2, 3 and 4 (Jt. Exh. 1, 3(a) and 3(b)). Each station contains a nurses' station which includes a desk area and a panel of call lights. Each nurse's station covers 35 to 56 patient beds (Tr. 561). Employees work on three different shifts (Jt. Exh. 1). Day shift CNAs work from 7 a.m. to 3 p.m., and LVNs work from 7 a.m. to 3:30 p.m. Evening shift CNAs work from 3 p.m. to 11 p.m., and LVNs work from 3 p.m. to 11:30 p.m. Night shift CNAs work from 11 p.m. to 7 a.m., and LVNs work from 11 p.m. to 7:30 a.m.[7] Generally, supervisors do not work during the night shift, and at least during the night shift, LVNs lead the CNAs.

Since 2008, Treude, Respondent's administrator for the past 8 years, oversees operations at the facility (Tr. 30–31). Treude maintains an office near the front entrance of Respondent; his office window faces the front parking lot (Tr. 60–61, 213–214). Treude retains the decision to discipline employees (Tr. 31). For its human resources matters, since mid-2009 or 2010, Respondent has retained CPEHR, an outside consulting group which provides employment law advice and guidance on topics such as employee discipline, assists with labor relations and bargaining, and prepares position statements (Tr. 35–37, 349). Josh Sable (Sable), CPEHR's General Counsel, is Treude's main contact. Sable, although an attorney by training, does not act in an attorney-client relationship with Respondent (Tr. 349).

Along with Treude, Respondent admitted that the following persons are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Nobleza, director of nursing (DON); Rachel Nicolas (Nicolas), assistant director of nursing; Gilman, director of nutritional services (DNS); Gay Rocha (Rocha), director of staff development (DSD); and Diane McClain (McClain), customer service supervisor.

As part of their duties, CNAs check patients' vital signs, change patients' diapers and respond to patient needs, in part, by responding to patient call lights (Tr. 120–121). If a patient needs assistance, the patient would press a button on the call light which would sound a loud alarm and blink a light at the nurses' station as well as over the patient's door (Tr. 121–122).[8] LVNs perform these same functions but also distribute medications.

During an 8-hour work shift, employees receive one unpaid meal break of 30 minutes, and two 10-minute paid rest breaks (GC Exh. 2 and 3(a); Tr. 66). The employees must clock in and clock out for the meal break but do not clock in and clock out for the 10-minute rest breaks (Tr. 67, 122–123, 210–211)[9]. However, CNAs should inform and work with the LVN when they plan to take their meal and rest breaks.

Respondent provides its employees a handbook at orientation which lists examples of unacceptable conduct in the workplace and also indicates various forms of discipline which may be issued (GC Exh. 2).[10] Sleeping on the job is listed as one ex-

[6] Prior to March 2012, Country Villa Novato Healthcare (CV) managed the facility (Tr. 560). CV's general policies and practices did not change when Respondent became its owner (Tr. 560). Also, Treude has been administrator since 2008.

[7] The witnesses referred to the night shift as the noc shift, which is presumably short form for "nocturnal."

[8] Faye Seneca (Seneca), a current LVN at Respondent, testified generally about her duties responding to patient alarms and break practices. Seneca testified that she learned during orientation that breaks should be staggered. Although Seneca is a current employee, I give little weight to her testimony as she began employment with Respondent in February 2016, well after the time period at issue. Furthermore, the record is unclear whether the orientation the discriminatees attended included these same instructions Seneca received regarding staggering breaks.

[9] Two time clocks are located near the office and the kitchen (Tr. 123).

[10] Rocha is responsible for staff orientation where she discusses the employee handbook and training.

ample of unacceptable conduct. The various forms of discipline include verbal warning, written warning, final written warning, suspension and discharge (Tr. 623–625).[11] However, Treude admitted that employees may nap or close their eyes during their 30-minute meal break as well as their 10-minute rest break (Tr. 79–80; GC Exh. 17). Ida Bantilan (Bantilan), a current CNA at Respondent, confirmed that during the various shifts she worked, employees take naps during both their meal breaks and rest breaks (Tr. 265–271).[12]

The testimony varied considerably on whether Respondent had a rule or policy on whether employees may take their breaks simultaneously or staggered. Treude testified that depending on the shift all breaks, including meal and rest breaks, should be staggered so no two employees are on break at the same time (Tr. 71–72, 115–116). However, he also admitted that no rule or policy existed that required employees to take their 10-minute break one at a time, and he did not know if the discriminatees had been informed of such rule but that those employees should have staggered their breaks (Tr. 68, 72–73). Rocha, who has been the DSD for 18 years at Respondent, testified that during the day shift, two employees could take meal and rest breaks at the same time but on the night shift all breaks should be staggered (Tr. 471).[13] Rocha explained Respondent had no written policy on how many employees may take breaks at the same time (Tr. 470), but stated the number of employees on a break at the same time based on shift time was a "practice" she conveyed at orientation and "once they're on the floor" (Tr. 479–480).

The testimony also varied as to whether employees must take their breaks away from the nurses' stations. At the hearing, Respondent presented a form titled, "Prohibition Regarding Off the Clock Work and Reporting Procedure Acknowledgment." This document provided to employees at orientation, states, "Meals should not be taken in work areas. Employees should have their meals in the break room, outside the facility, or in other non-work areas" (Emp. Exh. 4). Nobleza, who began employment with Respondent in August 2015, testified that employees should take their breaks away from the nurses' station. Rocha testified that employees should not sleep at the nurses' station (Tr. 468, 483), and denied that she had ever observed employees taking their meal break at a workstation (Tr. 478). Bantilan testified, instead, that employees often took their breaks at the nurses' station (Tr. 266–269).[14]

[11] Treude denied that suspensions could be used as disciplinary actions, but instead are used as a tool to investigate employees (Tr. 624).

[12] Although Bantilan testified about her experiences during the night shift, her testimony covered a time period prior to the events at issue and when the facility was owned by CV (Tr. 268). However, Bantilan continues to be employed by Respondent, Respondent continues to be led by Treude, and the rules and policies have not changed since at least 2007 (Tr. 266–268). Thus, I credit Bantilan's testimony regarding breaks as the break rules remained consistent and Treude admitted that employees were not prohibited from sleeping during their breaks.

[13] Brown confirmed that on the night shift, employees should take their 30 minute break one at a time.

[14] I credit Bantilan's testimony that employees took their breaks, including naps or rest periods, at the nurses' station.

III. UNION ORGANIZING CAMPAIGN AND RESPONDENT'S OPPOSITION CAMPAIGN

Richard Draper, director of organizing for the Union in Northern California, testified that he was contacted in the summer of 2015 by employees at Respondent (Tr. 24). A group of 10 to 12 employees at Respondent led the union organizing efforts (Tr. 25). These employees included Sabelino, Brown, Bernales, and Metellus (Tr. 25–26). Rather than collect authorization cards, the Union via the bargaining unit employees collected signatures for a showing of interest (Tr. 26). On September 16, the Union filed a representation petition with the National Labor Relations Board (NLRB) (Jt. Exh. 1 and 2).

In July or August 2015, Brown became active in the union organizing campaign (Tr. 169). She attended several meetings, and signed the showing of interest (Tr. 169–170). Brown spoke to many employees about the Union and collected showing of interest signatures from her coworkers (Tr. 170–171). Brown handed out union flyers at the end of her shift from the front parking lot and in front of the lobby (Tr. 171). Furthermore, Brown wore union buttons and red and white colored lanyards over her scrubs almost all shifts she worked, and often wore the color "red" to symbolize her support for the Union (Tr. 172–173; GC Exh. 14(a)-(d)).

Sabelino also became active in the Union in July 2015 (Tr. 211). She attended several union meetings, and obtained approximately 20 showing of interest signatures from her coworkers (Tr. 211–212). Sabelino spoke to her coworkers in the front parking lot and break room and passed out flyers promoting the Union (Tr. 213, 216). In August or September 2015, Sabelino began wearing a union lanyard with many pins attached to her lanyard (GC Exh. 9; Tr. 214–215); she also distributed these pins to her coworkers in the break room and front parking lot (Tr. 215). Sabelino acted as a key organizer during the night shift, signing up several employees including Bernales and Metellus.

In August 2015 Bernales became active in the union organizing campaign, attending 2 to 3 union meetings at the homes of his coworkers (Tr. 124). After one night shift in the front parking lot of the facility, Bernales signed a showing of interest, presented to him by Sabelino, supporting the Union (Tr. 124–125). Bernales wore a union lanyard with pin and button over his work scrubs during almost all his shifts (Tr. 125–127; GC Exh. 14(a)-(d)). In September 2015, Bernales also handed out union pamphlets in the back parking lot before his shift began (Tr. 128).

In September 2015, Metellus learned about the union organizing campaign from Sabelino who spoke to him in front of Respondent's facility (Tr. 296). Metellus attended a couple of union meetings, and signed a showing of interest (Tr. 296–297). By the end of September, Metellus also wore a union lanyard and pins during each shift (Tr. 297–299; GC Exh. 14(b)-(d)). Metellus also promoted the Union to his colleagues by speaking with them and passing out flyers (Tr. 299–300).

In response to the union organizing campaign, on September 15, Treude, based on Sable's recommendation, hired 6 labor consultants to educate the employees on labor organizations,

Section 7 rights, and the representation process (Tr. 47–50, 111–112, 520).[15]

Respondent sought to educate employees on why they should not elect the Union, and keep the facility union free.[16]

The labor consultants, led by Carina Hunt (Hunt), managed Respondent's opposition campaign but they were not hired to consult in disciplinary matters (Tr. 90). In conjunction with the labor consultants, Treude asked his supervisors to voluntarily cover shifts, including the night shift, to be available to provide flyers and other materials created by the labor consultants to the employees about the representation election process as well as to provide a presence at the facility and answer questions (Tr. 43–47, 741, 801). The labor consultants created all documentary materials distributed to the supervisors and employees, including the supervisors' sign-up calendar and flyers (Tr. 113; GC Exh. 6, 11(a)-(e), 12(a)-(e)).[17] Gilman, who volunteered to cover the night shift, testified that Respondent was not "fond" of the Union coming into its facility to represent the employees (Tr. 801–802).

Almost daily, Treude and other supervisors passed out and posted these flyers, and the flyers were placed in the break rooms (Tr. 64, 618).[18] One of these flyers asked employees not to "rush" and give Treude and Nobleza more time to work with the employees directly (GC Exh. 6).[19] The labor consultants also scheduled mandatory meetings of unclear frequency during the employees' work shifts to discuss the flyers Respondent distributed as well as the union process (Tr. 64, 111, 479, 486, 576; CP Exh. 1). Treude asked employees such as Brown and Sabelino to attend these meetings as well (Tr. 174, 217–218). Rocha scheduled the employees to attend these mandatory meetings but did not retain these lists (Tr. 285, 463). The supervisors volunteered to work during the shifts to cover the employees' work duties including patient care while numerous employees attended the mandatory meetings.[20] However, many of these supervisors, such as the director of nutritional services, could not provide direct patient care as they were not LVNs or CNAs (Tr. 659–664, 692).

Per the parties stipulation at the hearing, an unnamed CNA, employed by Respondent during the union organizing campaign and election, and employed by Respondent as of October 14, 2016, would testify that on various occasions, from September to October 2015, he saw members of Respondent's management team, including Gilman, wearing orange lanyards with blue writing stating "KEEP YOUR VOICE VOTE NO" on the length of the lanyard (Jt. Exh. 4(a) and 4(b)). Gilman admitted via stipulation that she wore such a lanyard, provided to her by the labor consultant, for less than 1 week prior to the election (Jt. Exh. 4(a)). Gilman recanted her testimony of September 18, 2016, regarding the issue of lanyards (Tr. 802, 844). In particular, the parties stipulated that Gilman would testify that she was mistaken when she testified on September 18, 2016, that she did not wear any paraphernalia to encourage employees to vote no in the upcoming election.

Eventually, Region 20 of the NLRB conducted an election at

[15] In support of their position that Respondent hired consultants to run an antiunion campaign, not merely to educate employees, the General Counsel and Charging Party sought to admit the labor consultants' invoice to prove that Treude hired these labor consultants and paid a certain sum which they argued showed union animus (marked as GC Exh. 26; Tr. 649–653). I rejected this invoice as an exhibit since I agreed that its relevance is specious and does not demonstrate animus, and more likely to be inflammatory and prejudicial to Respondent. Overall, the credible evidence shows that Respondent hired the labor consultants and used its supervisors to keep the workplace union free, contrary to Treude's noncommittal testimony.

[16] Treude's testimony varied several times as to whether Respondent had a position on union representation for the employees, and he could not explain clearly and consistently why he hired the labor consultants. Early in his testimony, Treude stated that Respondent's position was that the Union would not be in the employees' best interest (Tr. 52) but next said he could not recall if he conveyed to the labor consultants Respondent's position regarding union representation (Tr. 53). Treude also responded vaguely as to the role of these labor consultants, and could not recall when he hired them, how often meetings were held and who attended or any other significant detail as to their job at Respondent (Tr. 48–49, 111–112). Furthermore, later in his testimony, Treude admitted that through the labor consultants the employees were encouraged to vote "no" regarding unionization (Tr. 576). Sable, in contrast, testified that he advised Treude to hire the labor consultants to prevent the Union from representing the employees at the facility. Sable testified that he told the labor consultants that Respondent preferred to remain union free and to "run a campaign against NUHW" (Tr. 520). Thus, I do not credit Treude's testimony when he claims that Respondent merely sought to provide education on labor organizations to its employees. Treude, through the labor consultants, clearly sought to inform the employees Respondent's position as to why union representation would be unfavorable to the employees. The flyers handed out by the labor consultants also clearly demonstrate that Respondent did not want its workplace organized.

[17] The General Counsel issued a subpoena duces tecum requesting this calendar. Respondent claimed that no responsive documents existed. Treude testified that he did not know what happened to the calendar (Tr. 47–48).

[18] Bantilan testified that Treude gave her a flyer (GC Exh. 6, 12(a)—(e)), and told her to think over the Union because the Union would take a lot of money from their paychecks (Tr. 277). I credit Bantilan's testimony as Treude never denied making the statement to Bantilan, and as a current employee, Bantilan is testifying against her pecuniary interest which makes her testimony particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961); *Gateway Transportation Co. Inc.*, 193 NLRB 47, 48 fn. 12 (1971). Furthermore, an adverse inference is warranted by the failure of a witness to testify regarding a factual issue upon which the witness likely would have knowledge. *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). Treude's failure to address Bantilan's claim, although not alleged as a violation of the Act, at the very least undermines the tenor of Treude's testimony that Respondent only sought to educate the employees on labor representation in the workplace. Rather Treude's statement demonstrates that Respondent sought to sway its employees into voting against the Union.

[19] Nobleza testified that she did not know which employees were union supporters at the facility (Tr. 449). I cannot credit Nobleza's testimony. Bernales, Metellus, Brown, and Sabelino, as union supporters, blatantly wore lanyards and pins on the uniforms. Nobleza cannot reasonably claim to have not noticed such symbols of union support.

[20] Treude initially testified that he could not recall if the meetings were mandatory.

Respondent's facility from October 14 to 15 where employees chose the Union to represent them, and the Region 20 Regional Director certified the results of the election on December 30 (Jt. Exh. 1).[21] The bargaining unit included all full-time and part-time employees employed by Respondent in service and technical positions including CNAs and LVNs.

IV. OCTOBER 4: ALLEGED INTERROGATION

On Sunday, October 4, 1 week prior to the election, Rocha came into the facility early as part of Respondent's opposition campaign. Metellus testified that around 6:30 a.m. Rocha asked Metellus, who was wearing his union lanyard, near the vending machine how he planned to vote in the upcoming union election (Tr. 303, 323). [22] Metellus responded that he planned to vote in favor of the Union (Tr. 304). Rocha told Metellus that voting for the Union would have implications on his pay and that the Union could possibly take part of his paycheck (Tr. 304–305). Metellus testified that he responded to Rocha that the dues payment would not be a problem for him (Tr. 305).

Rocha, who admitted to reporting to work at 5 a.m. during the union campaign, denied ever asking any employee if he or she planned to vote for union representation (Tr. 462–463, 493). She also testified that she could not recall any encounter with Metellus (Tr. 426–463, 493).

CREDIBILITY

I cannot credit Rocha's testimony that she did not speak to Metellus on October 4, asking him about how he planned to vote in the election. The circumstances surrounding this date lead me to the conclusion that Rocha cannot be believed. During this time period, Respondent engaged in a determined campaign to ensure that its employees voted again union representation. Rocha was clearly aware of this purpose of the campaign as she scheduled employees to attend the labor consultants' meetings. Also, although not specifically asked of Rocha, several of Respondent's supervisors wore lanyards advocating that employees keep the Union out of the workplace. It seems highly likely that Rocha spoke to Metellus about his position on the Union. Further undermining her credibility, Rocha claimed that in her 18 years at Respondent as the DSD she has never seen any employee take a meal break at the nurse's station. This statement was directly contradicted by the credible testimony of Bantilan who stated that employees take their breaks at the nurses' station often. Circumstantial evidence supports the conclusion that Rocha knew that employees' take their breaks at the nurses' station. In addition, in 2009, an employee was accused of sleeping while on duty and the investigation revealed that the employee slept on her breaks at the nurses' station. Rocha, as DSD, must have known about this investigation which ultimately led to a finding of no discipline as it could not be proven that the employee slept during her break. Thus, I do not credit Rocha's denial of speaking to Metellus or any other witness about his position regarding the Union. In contrast to Rocha, as discussed further above, I found Metellus to be a highly credible witness. Metellus testified convincingly by remaining consistent throughout his testimony which raises no doubt as to what occurred during this conversation with Rocha.

V. ON OR AROUND OCTOBER 4: ALLEGED THREAT

Sabelino testified that on October 4 or 6, McClain, who worked at the facility for 36 years, asked to speak with Sabelino. Sabelino, who was wearing her union lanyard and pin, followed McClain into her office (Tr. 219, 236, 254). According to Sabelino, McClain warned her that whatever transpired between them should remain between them (Tr. 219). McClain asked Sabelino if she knew about the Union, and told her that the Union would collect dues (Tr. 220, 255). Sabelino responded by telling McClain that she knew about unions because of her prior job and that the dues were "not that much" (Tr. 220). Sabelino testified that McClain essentially told her that they are both single mothers and that it is hard to find a job (Tr. 220, 256). McClain ended the conversation by warning Sabelino to not discuss their conversation with anyone else (Tr. 221–222).

In contrast, McClain denied any conversation between Sabelino and her regarding the subject claimed by Sabelino (Tr. 720–722). McClain recalled a brief conversation in early September at station 4 where Sabelino asked her about the Union or if she had been in a Union previously (Tr. 720, 732). McClain testified that she told Sabelino that she did not know about the Union and was not eligible to join (Tr. 720). McClain also acknowledged that she had seen Sabelino wear a union lanyard (Tr. 734). McClain admitted also that she was aware of Respondent's desire to remain union free which she learned through meetings Hunt held with the supervisors and agents of Respondent (Tr. 729–730, 735–736).

CREDIBILITY

As discussed above, I cannot completely credit the testimony of Sabelino. Sabelino testified implausibly to certain events which undermines the complete truthfulness of her testimony. With regard to the alleged threat by McClain, I cannot credit Sabelino's version of events but instead rely upon the testimony of McClain. McClain, who was Respondent's only credible witness, testified clearly that the conversation between Sabelino and she did not occur. In contrast, Sabelino's testimony regarding the conversation was unclear as to what McClain allegedly said to her. McClain also candidly provided other conversations they had around the time of the union campaign. McClain also testified truthfully about Respondent's position regarding the Union. Compared to the testimony of Treude, Gilman, Rocha, and Nobleza, McClain acknowledged that she saw Sabelino wearing her union lanyards. I found McClain to be completely honest and forthcoming in her testimony. Sabelino,

[21] The five discharged employees voted subject to challenge in the election but their ballots were not determinative to the election results (Tr. 699).

[22] At the hearing, Metellus could not recall the name of the supervisor who spoke to him; he was only certain that a person named "Gay" who was the DSD spoke to him as he knew that the person who spoke to him provided training or "in-service" which described the job duties of Rocha as DSD (Tr. 303–304). Based on Respondent's organization at the time, Rocha held the position of DSD and it is more likely than not that Rocha spoke to Metellus.

on the other hand, testified vaguely about this alleged conversation with McClain, and had a poor recall as to the details which undermine the validity of her testimony.

VI. OCTOBER 7 SUSPENSION AND OCTOBER 12 DISCHARGE OF BERNALES, BROWN, SABELINO, METELLUS, AND RODRIGUEZ

October 6 to 7 Night Shift:

From Tuesday, October 6 to Wednesday, October 7, Bernales, Brown, Sabelino, and Metellus worked the night shift at station 4, caring for 42 patients; they were the only 4 employees working at station 4 that night (Tr. 123, 129, 223). As the LVN and with no supervisors present, Brown led the station that night. Meanwhile, Rodriguez worked the night shift at station 2.

That night, between 1 a.m. and 1:30 a.m., Bernales took his 10 minute rest break; he did not take another 10 minute break during that shift (Tr. 155). From 3:30 a.m. to 4 a.m., Bernales took his 30 minute meal break at the back of or behind the nurse's station; this time period was the time Bernales always took his meal break (Tr. 123; 149, 153, 155). Bernales explained that he did not take his meal break in the break room because it was dirty and messy (Tr. 130). During his meal break, Bernales closed his eyes but did not sleep due to the sound of the call lights (Tr. 131). Bernales admitted that he had taken naps during his breaks in the past and had never been informed that he could not take his breaks at the nurses' station.

Around 4 a.m., Bernales clocked back in, and went into the nurse's station (Tr. 131). Bernales then noticed that room 411's call light was activated (Tr. 131–132, 156). As he began to go to Room 411, Brown, who was inside the nurse's station writing on a document, told Bernales to take care of the call lights and that she would take her 10 minute break (Tr. 132–133, 156, 178). Brown also told Metellus, who was sitting nearby the nurse's station, across from room 407 that she planned to take her 10 minute break (Tr. 133–134, 158, 178, 307, 324). Bernales noticed around this time period that Metellus was holding a paper, looking down at it (Tr. 158).

Meanwhile, Sabelino told Brown as she was the charge nurse that she planned to take her 10 minute break at the same time (Tr. 184–185, 225–226, 241).[23] Metellus testified that Sabelino told him she planned to take her break and to answer any call lights (Tr. 309, 325). Sabelino was seated inside the nurse's station, next to Brown (Tr. 224–225). Sabelino closed her eyes for 10 minutes (Tr. 225). Brown explained that she also did not take her break in the break room since it is messy. Brown insisted that she took her 10 minute break without an alarm since her body was aware of how to sleep for only 10 minutes (Tr. 200). Sabelino testified similarly that she knew when 10 minutes passed as she had worked the night shift for many years and conditioned her body to sleep for only 10 minutes (Tr. 239–241). Both Brown and Sabelino denied they slept with pillows behind their heads or their feet propped up. Sabelino testified that on the back of her chair was a jacket, not a pillow (Tr. 238). Brown also testified that when she woke up, Sabelino was awake next to her (Tr. 200). Sabelino testified similarly (Tr. 241).

While Brown and Sabelino took their 10 minute breaks at the nurse's station, Bernales, after taking care of a patient in room 411, went to throw the dirty linens into a barrel outside of the room, and when he glanced at the nurses' station, he saw Brown and Sabelino napping which was around 4:15 to 4:30 but he did not see Metellus again (Tr. 157–159). Thereafter, he continued to check on his patients until the end of his shift (Tr. 157).

Also while Brown and Sabelino took their 10 minute break, Metellus took care of two patients who needed to use the restroom and waited, sitting on a chair, outside rooms 401, 402, and 403 to permit the patients' their privacy until they pushed their call light buttons (Tr. 311–316). While he was waiting for the patients, Metellus noticed a woman "co-worker" who passed by the nurse's station on her way to station 3. Metellus estimated the time to be between 4 a.m. to 4:10 a.m. (Tr. 316). Metellus testified he waited outside these rooms for approximately 7 minutes for both patients (Tr. 327–331). Thereafter, he prepared ice water for the patients. Metellus testified that on his own initiative he set an alarm to wake Sabelino but by the time he returned to the nurse's station, Brown and Sabelino were already awake (Tr. 332). Metellus testified he saw Bernales answering call lights while Brown and Sabelino took their 10 minute break (Tr. 335–336).

Meanwhile, Gilman testified that she arrived "sometime after 3:50" a.m. on October 7 (Tr. 743). She came into the facility early that day to make rounds per Treude's request as part of Respondent's union opposition campaign (Tr. 575, 741–742).[24] Gilman testified that she knows she arrived after 3:50 a.m., because she noticed the time of 3:50 a.m. on her car clock, at a stop sign by a convenience store located three blocks from the facility (Tr. 743). Gilman parked in the back parking lot, and entered through the back kitchen door (Tr. 743–744). She entered her office, placed her bags down, and logged into her computer which took 3 to 4 minutes (Tr. 744, 805). Thereafter, she checked her emails "quickly" (Tr. 745). Then, she walked into the kitchen and checked the temperature logs on her freezers and refrigerators (Tr. 745, 810). Gilman also checked her refrigerator contents for labels, dates and tidiness, and checked her stove and oven to ensure that the evening staff completed their assigned duties (Tr. 745, 808). Next, Gilman went into the employee lounge, straightened up and removed some papers which she placed on her desk in her office after she went to the restroom (Tr. 746–747, 814–815). Gilman looked at these

[23] The testimony varies as to whether Sabelino informed anyone other than Brown that she intended to take her 10 minute break at the same time as Brown. Sabelino testified that she only told Brown that she planned to take her 10 minute break at the same time as herself. However, Metellus testified credibly that Sabelino told him she planned to take her break. As explained within, I rely completely on Metellus' version of events and cannot rely completely on Sabelino's versions. When her testimony conflicts with Metellus, I rely upon Metellus, not Sabelino.

[24] Several other supervisors signed up for October 6 to 7 night shift as well but no other supervisors testified that they observed employees sleeping that shift while on duty or while on break. Furthermore, during Respondent's investigation, Respondent did not question any other supervisor who worked that night shift.

flyers a few minutes since there was "derogatory stuff written on it" (Tr. 747, 814–815).

Thereafter, Gilman began rounding the stations (Tr. 747). Gilman testified initially that only 10 to 15 minutes passed from the time she looked at the clock at 3:50 a.m. while driving to the time she began rounding in station 4 (Tr. 748, 833–835).[25] Later, Gilman testified that perhaps 20 minutes passed.

On her first round to station 4, Gilman testified that she noticed 2 female employees sleeping behind the nurses' station (Tr. 749). She further testified that she noticed that one employee had a white pillow behind her head and her feet propped up while the other employee also had a white pillow behind her head (Tr. 749–750). Gilman testified that she stood in front of the two sleeping employees for 20 to 25 seconds watching them (Tr. 750–751). Gilman also claimed that two other male employees slept in station 4. She discovered one male employee in the hallway in station 4 where he slept against the wall between the nurses' station and room J (across from rooms 407 and 408); he had a chair to prop up his feet and a pillow behind his back (Tr. 752–753). Gilman testified that she stood in front of this employee within arm's reach for 1 minute but he did not wake up (Tr. 753). The other male employee she discovered in front of room 415 where he slept also with his feet propped in front of him on a chair with a pillow behind his head and his hat and glasses on the railing beside him (Tr. 755–756). Gilman testified she stood in front of him within arm's reach for several seconds to see if he woke up (Tr. 755). Despite standing in front of the employees from several seconds to up to a minute, Gilman testified that she could not recall if any of these sleeping employees was wearing a union button or lanyard (Tr. 757).

Gilman then went to station 3 and spoke to employees but did not ask them about sleeping at the facility because she did not know the "protocol" (Tr. 758–759). Gilman then went through the lobby and peeked into station 1 (Tr. 760). Gilman waived at a nurse in station 1, and also noticed a female employee sitting in a chair with her head down on a bedside table in front of room 117; Gilman testified the employee appeared to be sleeping (Tr. 760).

On her second round, Gilman went back to station 4 and testified that the employees remained sleeping in the same positions she saw them in during her first round (Tr. 762). Again, Gilman testified she was within arm's reach of the employees in the hallway (Tr. 762–763). Gilman then stopped by station 3 briefly and asked the employees how they were and if they had any questions (Tr. 764). Gilman then went into station 1 and observed that the employee in front of room 117 appeared to still be sleeping (Tr. 765). Gilman asked a question to the nurse regarding the patient sleeping in the room opposite the sleeping employee (Tr. 767). Gilman also testified that she stood behind the sleeping employee for a few minutes (Tr. 768).

On her third round to station 4, the employees remained asleep according to Gilman (Tr. 769). Gilman testified, "So when I saw the two ladies sleeping behind the nurses' station and they were still asleep, I walked past and I noticed that the two guys were still sleeping. And then at that point I was thinking, gosh, it has been some times [sic], and so I decided to take a picture of the two girls" (Tr. 770). Gilman explained that she was not sure of the protocol so she took a picture (Tr. 770). Gilman took pictures of the two employees sleeping behind the nurses' station; she stood up on her tiptoes and took a photo with her phone camera which made loud click noise when she took the photo (Tr. 772). Gilman testified that she did not take any more photos because she was "scared" and not sure if she could take photos but also needed "proof" (Tr. 772). She further explained that she was not sure if they were on their breaks (Tr. 772–773). Gilman said she hid behind a wall due to her fear and dared not take a photo of the other two employees; she remained in station 4 for a minute to a minute and a half (Tr. 774). Gilman testified that 15 to 20 minutes passed from when she first began rounding at station 4 to when she took the photo on her third round in station 4 (Tr. 774). Gilman went back to station 3 but did not ask about the employees sleeping in station 4 (Tr. 775). Then Gilman went to station 1, and noticed the patient across from the sleeping employee was starting to wake up (Tr. 776). Gilman then asked the nurse if the sleeping employee was to be watching the patient. The nurse responded affirmatively, and Gilman then raised her concern that the patient is starting to wake up. The nurse then "smacked the CNA's shoulder and said, 'wake up, go attend to your resident'" (Tr. 776). Gilman thanked the nurse, and reminded the nurse about the multiple falls of the patient. Gilman estimated that 15 to 20 minutes passed from the time she first saw the employee in station 1 asleep to when she asked that she be woken (Tr. 777). Gilman testified that she asked for the station 1 employee to be woken up because the patient was waking up (Tr. 777).

Gilman testified that the time was between 4:20 and 4:30 a.m., when she went back to station 4 (Tr. 778). All employees in station 4 were awake at this point (Tr. 778). Gilman only greeted the employees and did not ask them about sleeping (Tr. 780). Gilman admitted she never looked at any clocks during the entire time she rounded on stations 1, 3, and 4 (Tr. 835–836).

That morning Gilman spoke to Treude about what she observed earlier (Tr. 780).[26] Gilman testified that she told Treude

[25] As discussed herein, I do not credit Gilman's time estimates throughout this morning as the estimates are unlikely and unbelievable due to the length of time she allocated to each task she completed. Metellus likely saw Gilman while she rounded the stations; he estimated her time to come through was between 4 a.m. and 4:10 a.m. Based upon the various conversations that occurred after Bernales returned from his lunch break, it appears that Brown and Sabelino began their break closer to 4:10 a.m. or thereafter which comports with when Metellus saw a woman coworker pass through station 4. However, the precise time cannot be confirmed as neither Gilman nor any other witness looked at the time on a clock. While Gilman claimed that her initial steps from driving to begin rounding took a short time, she claimed that her time rounding took a rather long time. Because these time estimates make little sense, I cannot credit Gilman's testimony.

[26] Again, Gilman's timing of events is not likely as Gilman claims the time she spoke to Treude was before 6:30 a.m. Likewise, Treude's timing is not likely correct either as he claimed he arrived at the facility at 6 a.m. The credited evidence shows that Treude spoke to Bernales

that she saw 5 employees sleeping and did not know if they were supposed to be sleeping. She also told Treude she took a photo but was not certain if she was permitted to do so and worried the sound would wake the employees. With her phone, Gilman showed Treude the photo she took of Brown and Sabelino (Emp. Exh. 6; Tr. 572–573).[27] The photo, which does not indicate the time, shows two females behind the nurses' station with closed eyes and their heads resting against the back of chairs (Emp. Exh. 6). In front of the nurses' station is a cart with a couple papers on top. Treude, who testified that he was shocked as sleeping while on duty is an "obvious safety concern," asked for more details from Gilman, and testified, "With each individual, I believe she showed me the picture at that point, I believe time frame and overall of her rounding" (Tr. 562, 646).[28] She then sent the photo to Treude via text message. Gilman and Treude then walked through station 4 where she pointed out which employees were sleeping (Tr. 782).

Bernales testified that he saw Gilman and Treude together at the facility in the hallway close to the kitchen when Treude asked Bernales to attend an "anti-union meeting" (Tr. 134–135).[29] Before Bernales went to the meeting, Treude asked Bernales when he took his break (Tr. 135–136).[30] Bernales told Treude he took a break between 3:30 a.m. and 4 a.m., and a 10 minute break sometime between 1 a.m. to 1:30 a.m. (Tr. 135–136). Treude took notes of his conversations with the employees (Emp. Exh. 9).[31]

Sabelino testified that she saw Treude and Gilman talking after 6 a.m. (Tr. 227). Treude asked Sabelino if she took her 30-minute and two 10-minute breaks during her shift (Tr. 227–228). Sabelino responded that she had taken her 30-minute break and testified that she could not recall whether she told Treude she took her 10-minute break (Tr. 227–228, 245–246). Prior to the end of their shift, Treude asked Metellus and Brown separately about their breaks. Brown, who testified that she was not sure which breaktime Treude wanted to know, told Treude that she took her 10-minute break around "4-ish" (Tr. 177). Metellus testified that Treude asked him when he took his lunch break during his shift, and Metellus responded with his breaktime but could not recall what he told Treude exactly (Tr. 316–317).[32]

Also early that morning, Treude went to Nobleza, who began working at Respondent only a few months prior, and informed her that he found out staff was sleeping while on duty (Tr. 401, 577).[33]

After speaking to the employees, Treude sent an email to Sable (GC Exh. 17, 19; Tr. 350, 582). At about 6:22 a.m., Treude wrote that Gilman found employees sleeping when she came into the facility at 4 a.m. Treude asked Sable if he should educate, suspend, give final warnings, or terminate all of them. Sable responded, asking Treude what was his past practice. Treude stated that in the past he suspended one employee but could not recall the details, and generally would suspend, investigate, and if found sleeping not on their break, then to terminate. Treude sent another email to Sable at 9 a.m. explaining what Gilman told him (GC Exh. 17). This email states, in part, "My DSM said it was about 4:10am." It is unclear from this email to what the time refers, and Treude could not recall what he meant by the sentence in his email (Tr. 592).

Coincidentally, in this same email to Sable, Treude stated that he just learned that his activity director had seen staff sleeping during the night shift the week prior but "that could be during their break time as well" (GC Exh. 17). Treude could not recall if this incident had been investigated or if the employees had been disciplined but later testified that he asked Nobleza "to follow up" (Tr. 81, 352, 592).[34]

Later that day, Treude forwarded the picture taken by Gilman to the labor consultants including Hunt because he was "in shock" (Tr. 78, 90–93, 562, 586–587; GC Exh. 16).

October 7 Suspensions:

Upon Treude's instructions, on Wednesday, October 7, Nobleza called the employees, separately, and told them that they were suspended because it was reported that they were asleep at work (Tr. 137, 160, 179, 228–229, 318, 407; Emp. Exh. 3). Nobleza told the employees that Respondent planned to inves-

between 5:15 a.m. and 5:30 a.m. asking him to attend a meeting with the labor consultants which began at 5:45 a.m. (Tr. 782). Thereafter, Treude sent an email to Sable at about 6:22 a.m. (GC Exh. 17, 19).

[27] When she took the photo, Gilman's phone camera did not provide a time stamp. However, in February 2016 when she upgraded her phone camera software, the time stamp of 4:21 a.m., appeared on the photo (Tr. 567; Emp. Exhs. 7 and 8). When Treude considered Gilman's photo as part of the investigation, he did not have the time stamped version (Tr. 564). Therefore, I give little weight to the photo with the time stamp as it was not considered by Treude when he decided to suspend and terminate the employees.

[28] This statement is not true as Gilman took only one photo, and at the time, her phone did not have the technological capabilities to show the time the photo was taken.

[29] Bernales, Rodriguez, and Brown attended a meeting held by the labor consultants on October 7 at 5:45 a.m. (CP Exh. 1). The topics discussed at this meeting included unfair labor practices, contracts and management rights, and strikes. The in-service meeting minute notes with employee signatures corroborate Bernales' testimony that Treude asked him to attend the labor consultants' meeting, as well as establishes a timeframe for events the morning of October 7.

[30] Gilman could not recall if Treude spoke to any employees in her presence (Tr. 782–783).

[31] I give these notes little weight because the notes are unclear as to when they were written, and signed by Treude. Furthermore, the document also contains notes dated October 9 with information about each employee but Treude did not interview the employees on October 9. Thus, these notes are hearsay and unreliable.

[32] Treude testified that all four employees told Nobleza and him that they only took their meal break, not their rest breaks, during their shift (Tr. 577–578). I do not credit Treude's testimony due to its overall unreliability but also because Bernales, Metellus, and Brown testified credibly that they informed Treude of their breaks.

[33] Treude and Nobleza testified that they spoke to the employees together that morning but the record is unclear whether they both spoke to the employees or if Treude only spoke to the employees with Gilman present.

[34] The General Counsel requests that I take an adverse inference that Nobleza could have been questioned regarding Treude's testimony that he asked Nobleza to follow up on the activity director's report but Respondent failed to do so. I agree with the General Counsel and draw an adverse inference that had Nobleza been questioned she would not have corroborated Treude's testimony that he asked her to follow up with the activity director. *Flexsteel Industries*, supra.

tigate the allegation, and she would call each again. Nobleza specifically told Brown and Sabelino that someone took a picture of them sleeping (Tr. 179, 228). Sabelino admitted to Nobleza that she was sleeping during her breaktime (Tr. 228–229).

Bernales, thereafter, spoke to Sabelino and Metellus, letting them know he was suspended for allegedly sleeping at work, and they responded with the same news (Tr. 161).

On Thursday, October 8, Draper sent Treude a letter and email regarding the suspensions of Brown, Sabelino, and Metellus (CP Exh. 2). Treude failed to recall whether he read this letter but email correspondences show that Treude forwarded Draper's email to his counsel Richard Albert (Albert) (CP Exh. 3). Thus, it is more likely than not that Treude read Draper's letter which identified Brown, Sabelino, and Metellus as lead union supporters.

Respondent's Investigation:

On Friday, October 9, Nobleza called each employee, individually, and asked them to report to her office that morning (Tr. 138, 179, 410).[35] Bernales, Brown, and Sabelino arrived at the facility together since Brown gave them a ride in her car (Tr. 162, 260). Interview records show that Nobleza first interviewed Brown at 10:20 a.m., followed by Rodriguez at 10:36 a.m., Sabelino at 10:43 a.m., Metellus at 10:54 a.m., and Bernales at 11:04 a.m. (Emp. Exh. 1).[36]

Nobleza along with Nicolas, who acted as a note taker, met with Brown first. Brown told Nobleza she slept during her breaks (Tr. 180; Emp. Exh. 1). Brown also told Nobleza that a picture of Sabelino and her sleeping was placed all over the facility but Nobleza denied knowledge about how the picture was placed publicly in the facility (Tr. 180–181, 184; GC Exh. 8).[37]

The interview notes for Rodriguez states, "So I grabbed my table and put my head on the table. I don't think I was sleeping. I was resting my head. I could still hear everything around me" (Emp. Exh. 1).

The interview notes for Sabelino state that if she was sleeping, it was during her breaktime (Tr. 230; Emp. Exh. 1).

The interview notes for Metellus state, "One resident is on the commode, and another on the bedpan. I was sitting on a chair waiting for the call light. Near 408 and 405. After 4 am I did rounds. I don't know whats [sic] going on. I didn't sleep. No complaints, went home" (Emp. Exh. 1; Tr. 321).

Bernales told Nobleza that if it appeared he was sleeping, the time period was during his break (Tr. 139–140). The interview notes state, "When I went on break from 3:30 – 4 am, I just went back to my station. I took a nap on my break time. Nursing station is too noisy. I closed my eyes, but my mind is alert. I admit I take my nap, but that is my break time" (Emp. Exh. 1).

After the interviews with the employees, on Friday, October 9, Treude spoke to Gilman about her observations the morning of October 7 (Tr. 583, 783).

After the interviews with Sabelino, Brown, Metellus, Rodriguez, and Bernales, Treude asked Nobleza to interview other employees who worked on the night shift, and Treude also interviewed other employees (Tr. 407, 583). Nobleza spoke with night shift employees asking these employees the general question of whether they have seen anyone sleeping on the job when not on break, but no one responded that they had (Tr. 408, 414, 417, 430). She did not ask the employees specifically if they witnessed any employees sleeping during the October 6 to 7 night shift (Tr. 439). Nobleza also never asked the employees if employees take naps during their breaks (Tr. 440–444). Nobleza took notes during her various meetings during the investigation (Emp. Exh. 3).

Regarding Rodriguez, Respondent conducted its investigation of her alleged sleeping in station 1 in the same manner as the station 4 employees (Tr. 588). Treude testified that Nobleza and he spoke with the night-shift charge nurse of station 1 who allegedly confirmed that Rodriguez was sleeping (Tr. 589). Respondent issued a written warning to the station 1 night shift LVN because she allowed Rodriguez to put her head down and sleep (Tr. 589).

From October 9 through 11, Treude testified that he continued to discuss the incident with Sable, Albert, and Hunt (Tr. 593–594; Emp. Exhs. 3 and 5).[38] Albert interviewed Gilman as well on October 10 (Tr. 784). Albert sent an email to Treude, Sable, and Hunt summarizing his interview with Gilman (Emp. Exh. 5). In response, Hunt suggested immediate education to "leadership" as to what they should do if they see sleeping. Hunt also asked for the policy on sleeping. Albert provided his recommendations as to what course of action Treude could take.[39] Albert, in his recommendation to terminate all 5 employees, wrote, "The employee in unit 1 [Rodriguez] is a bit of a different story, but I would still terminate her—even though the Charge Nurse appears to have tolerated her sleeping—in order to demonstrate just how serious of an issue it is when employees at your facility sleep while on duty. I think that giving her lesser discipline, in this situation, sends the wrong message to the NLRB or a judge looking at this. It is possible that NLRB or judge could view her situation as being less serious than the others, but I would rather have you take that risk, than the risk letting her remain employed somehow dilutes our arguments with the other 4" (Emp. Exh. 5). Albert also rec-

[35] Sabelino testified that Brown told her about the meeting with Nobleza (Tr. 229, 258–259). I do not credit Sabelino's testimony as it is incredulous to believe that Nobleza would tell Brown to tell Sabelino about the investigatory meeting.

[36] Nobleza testified she set up the interviews 45 minutes apart but the meetings lasted for much shorter time periods per the interview records (Tr. 410).

[37] Sometime after October 7, Gilman's October 7 photo of Brown and Sabelino was placed all over the facility including the break rooms (GC Exh. 8). The source for the handwriting on this exhibit was not identified at the hearing. Treude took these photos down, and said he did not know who posted the photos (Tr. 93).

[38] It is unclear from the record how Treude obtained the information contained in the October 9 email. As such I do not credit its contents for the truth of the matter asserted.

[39] Treude testified that he did not read Albert's email when he received it (Emp. Exh. 5). He did not respond to Albert's request for Hunt and him to provide their thoughts. Treude appears to claim that he selectively reads his emails but for such a "shocking" incident to have occurred, Treude's claim makes little sense. Treude alleges to have taken his lead from Sable, and ignored Albert. Again, I do not credit Treude's testimony.

ommended disciplining the charge nurse for station 1 for allowing the employee to "remain sleeping" (Emp. Exh. 5). Treude made the decision to do exactly as Albert recommended.

Also on October 10, Treude informed Albert, Hunt, and Sable that Nobleza interviewed other CNAs "on all stations, no findings, they denied seeing anything" (GC Exh. 20). Treude explained that he included Hunt on the emails so "she is aware" of what is happening since she managed Respondent's union "education" campaign. Sable testified similarly (Tr. 521). Treude further explained that Nobleza left a message for another CNA but "he is pro union" (Tr. 529–530, 603–604). Treude failed to provide a reason as to why he made such a comment in his email.

October 12 Discharges:

By October 10, the evidence shows Treude made the decision to terminate the employees (Emp. Exh. 5). Treude reviewed all the evidence one last time and called Sable before deciding to terminate the employees on Monday, October 12 (Tr. 594, 682, 703).[40] Treude relied primarily on the advice given by Sable who recommended termination (Tr. 95, 512–514). Both Sable and Treude did not believe the employees' version of events or the other employees' denial of observing employees sleeping while on duty, and instead believed only Gilman.

Treude called the employees, individually, on October 12, informing them that they were terminated (Tr. 140, 181).[41] When asked by Bernales why he was terminated, Treude responded that he was terminated for sleeping on duty (Tr. 140). Bernales again denied sleeping while on duty during the October 6 to 7 night shift (Tr. 141). Sabelino asked Treude if her termination was related to her union activity but Treude denied her claim.

Treude testified that he terminated the five employees because all were asleep at the same time with 4 employees in the same station; and none of these employees was on a break (Tr. 85, 94, 595). Treude stated that these employees' action was "gross misconduct," and that their sleeping at the same time "takes it to another level" (Tr. 86, 598, 645). Treude testified that the safety of the patients was jeopardized by these employees (Tr. 596). In addition, regarding Rodriguez, Treude testified that she was terminated because she was asleep while on duty and needed to be awakened by the charge nurse (Tr. 665). Treude stated he did not credit the employees because when he "immediately interviewed them" they did not mention breaks other than their meal break (Tr. 598).[42]

Treude continually denied any knowledge that Bernales, Brown, Sabelino, or Metellus were prounion supporters despite their wearing union lanyards and pins during most shifts and during his discussion with each of them the morning of October 7 (Tr. 604). Treude also denied ever witnessing employees handing out prounion flyers in the front parking lot which is visible from his office window (Tr. 604). Sable also denied knowing the union sympathies of Bernales, Brown, Sabelino, and Metellus (Tr. 531). Both Treude and Sable continued to deny knowledge of these employees' union sympathies despite receiving a letter and email from Draper on October 8 identifying Brown, Sabelino, and Metellus as "well-known union supporters" (CP Exh. 2; Tr. 531–532, 685).[43] Sable stated that he relied upon Gilman's statement, Nobleza's October 9 notes, and Respondent's past practice which all led to "undeniable proof" that the employees slept while on duty at the same time.

Incredibly, Treude could not recall if he talked to Gilman about why she was concerned with waking the employees since the employees' alleged sleeping created an alleged safety problem for the patients. Since the terminations, Respondent has not revised or clarified its meal and rest break policy, which has remained the same as before the suspensions and terminations (Tr. 108, 281, 283, 482).

Respondent's Disciplinary History:

The evidence shows that Respondent never disciplined, let alone, terminated employees for sleeping at work (GC Exh. 4; Tr. 40). But a similar situation occurred in June 2009. In June 2009, Respondent investigated an allegation of a night shift LVN sleeping on the job (GC Exh. 4). The investigatory material included a picture of a female with her head down on the desk at the nurse's station. Many CNAs and LVNs were interviewed, including the alleged sleeping LVN. The LVN admitted to sleeping on her break but not when working or on duty time. Other employees admitted to sleeping only during breaks. In conclusion, as the evidence could not substantiate that the LVN was sleeping during duty time, she was not disciplined. Management explained to the LVN that she should take her breaks in the break room and that what she wanted to do on her break was up to her. Furthermore, the investigatory summary indicated that the DSD would provide education to night-shift employees as to where they could take their breaks and sleeping during work and nonwork times. Furthermore, management and the DNS would randomly visit the night shift to ensure employees were not sleeping during worktime. Treude differentiated the situation involving the 2009 employee by explaining that the incident at issue here involved all 4 employees sleeping at the same time (Tr. 600).

[40] Treude took notes of his various conversations, and course of action the week of October 6 (Emp. Exh. 9).

[41] Both Treude and Gilman signed statements prepared with the assistance of Albert on Monday, October 12 (Tr. 594–595). I allowed these two statements to be admitted into evidence, not for the truth of the matter asserted, but rather as Respondent's course of action in these events and not necessarily how they proceed in every employee investigation (Emp. Exhs. 10 and 11; Tr. 611–614, 789). Even reviewing the contents of the statements shows a lack of credibility in Gilman's statement. Gilman in her statement, taken only a few days after the alleged sleeping incident, failed to provide significant details of her actions the morning of October 7 when she came into work. Her statement, instead, conveys that she began her rounding very close in time to when she arrived at work which is unbelievable compared to the details she provided at the hearing. Treude's statement mentions a different time than when he said he arrived at the facility on October 7, as well as relies upon an email sent on October 9, 2 days after speaking with the employees the morning of October 7.

[42] Again, I do not credit Treude's version of the facts. Instead, I credit the employees, other than Sabelino, who did inform Treude which breaks they took that night shift.

[43] Treude could not recall reading this letter and email but also admitted he forwarded the email to Albert (Tr. 684).

The General Counsel presented evidence of other disciplinary actions Respondent took against employees.[44] Respondent issued a verbal warning to an employee who failed to respond to a call light and alarm despite standing next to the room and despite being educated on this issue more than once in the past (GC Exh. 21). Respondent issued verbal warnings to two other employees for failing to properly place patient alarms "resulting in potential patient harm" (GC Exh. 20(a)-(b)).

ANALYSIS

A. Respondent violated Section 8(a)(1) of the Act when Rocha Interrogated Metellus on October 4

The complaint alleges that on about October 4, Rocha interrogated employees about their union sympathies in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act states, "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." In *Rossmore House*, 269 NLRB 1176, 1177 (1984), the Board set forth its test for evaluating if an employer interrogation of its employees violates Section 8(a)(1) of the Act. The Board's test considers the totality of the circumstances, including whether the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rock Valley Trucking Co.*, 350 NLRB 69, 79 (2007). In doing so, the Board considers the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether the employee is an open and active union supporter. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Intertape Polymer Corp.*, 360 NLRB 957, 957 (2014), enfd. in relevant part 801 F.3d 224, 231 (4th Cir. 2015). In general, it is coercive for an employer to inquire as to the union sentiments of employees, "even when addressed to open and active union supporters in the absence of threats or promises." *Rossmore House*, supra (citing *PPG Industries*, 251 NLRB 1146 (1980)); *President Riverboard Casinos of Missouri, Inc.,* 329 NLRB 77, 77–78 (1999).

In applying Board precedent to the facts established here, I find that Rocha's questioning of Metellus was unlawful. Based on the credited testimony, only a week before the representation election, Rocha asked Metellus how he planned to vote in the union election and after he responded that he planned to vote for the Union, Rocha told Metellus that the Union could take a portion of his paycheck. Although Rocha was not Metellus' direct supervisor, Metellus recognized Rocha as a supervisor at the facility. As Respondent recently hired Metellus, Metellus likely recognized Rocha, who provided orientation training to employees. Thus, Rocha's comments regarding the Union's ability to take a portion of Metellus' paycheck objectively rings with truth. Furthermore, Respondent clearly ran an obvious union opposition campaign around this time period, and Metellus clearly supported the Union as he wore his union lanyard and pins. Moreover, Metellus responded truthfully to Rocha's queries, informing her that he planned to vote for the Union and that he could not be swayed by the possibility that the Union could take a portion of his paycheck. Finally, Rocha offered no explanation for her question nor did she provide assurances against reprisal to Metellus. Under these circumstances, questioning an employee about his union views one week before the representation election would have a reasonable tendency to interfere with an employee's Section 7 rights. Thus, Respondent violated Section 8(a)(1) of the Act.

B. Respondent Did Not Violate Section 8(a)(1) of the Act by Allegedly Threatening Employees

The complaint alleges that on or about October 6, Respondent, by McClain at its facility threatened its employees with unspecified reprisals if employees elected the Union to represent them. Specifically, according to Sabelino, McClain essentially told her that if the Union represented the employees at Respondent, then it may be difficult for Sabelino to find a job especially since she is a single mother. In other words, Sabelino may no longer be employed by Respondent if the Union is chosen to represent the employees.

The test to determine if a statement violates Section 8(a)(1) is whether "under all the circumstances" the remark "reasonably rends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997). It is well settled that when evaluating the remarks the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001). Statements which imply a threat of job loss are unlawful. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011).

As set forth above, I do not credit Sabelino that the conversation between McClain and she occurred. Therefore, this allegation in the complaint is dismissed.

C. Respondent Violated Section 8(a)(3) and (1) When it Suspended and Terminated Sabelino, Brown, Bernales, and Metellus

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when on October 7 it suspended and on October 12 it terminated Bernales, Brown, Metellus, and Sabelino.

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful activity under *Wright Line*, the burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial show-

[44] Other discipline issued by Respondent related to lack of documentation. For failing to complete a skin sheet report, Respondent issued corrective action memos to employees but did not taken any disciplinary action (GC Exh. 25(a)-(l)). When an employee failed to give a report to the next nurse, Respondent issued a written warning (GC Exh. 24). In April 2015, Respondent issued a written warning, in part, to a nurse who refused to work his assigned shift because he did not like the schedule (GC Exh. 23). Respondent also issued a verbal warning to a nurse for failing to document medical statistics (GC Exh. 22).

ing of discrimination, the evidence must prove: (1) the employee engaged in union or concerted activity; (2) the union or concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity.[45]

The Board will consider circumstantial evidence as well as direct evidence to infer discriminatory motive or animus, such as (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (4) disparate treatment in implementation of discipline; (5) inappropriate or excessive penalty; and (6) employer's shifting or inconsistent reasons for discipline. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Ronin Shipbuilding, Inc.,* 330 NLRB 464 (2000); *CNN America, Inc.*, 361 NLRB No. 47 (2014) (citing *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995)); *Brink's, Inc.*, 360 NLRB 1206, 1206 at fn. 3 (2014). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

Once the General Counsel has met his initial burden that the protected conduct was a motivating or substantial reason in the employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the employer's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference).

Applying *Wright Line* to the suspensions and terminations of Metellus, Sabelino, Brown, and Bernales, the General Counsel's prima facie case is met. The record shows that from July or August until their suspension and termination, Metellus, Sabelino, Brown, and Bernales visibly supported the union organizing campaign by wearing lanyards and buttons, passing out flyers, and getting employees to sign for a showing of interest. They spoke to their coworkers in the parking lot and break room, and their actions were visible from Treude's office. Thus, they engaged in union activity which is protected under the Act.

Respondent claims that its supervisors were unaware of the employees' union activity. I find this claim disingenuous. Direct evidence is not required, and knowledge may be inferred by circumstantial evidence. *Windsor Convalescent Center*, 351 NLRB 975, 983 fn. 36 (2007); *Kajima Engineering & Construction*, 331 NLRB 1604 (2000). Obviously, Respondent was aware of the organizing campaign and launched its own opposition campaign. Again, Metellus, Bernales, Brown, and Sabelino openly solicited employees to sign the showing of interest and passed out their own flyers as well as lanyards and pins. In addition, the Union sent a letter to Respondent after the employees were suspended identifying Metellus, Brown, and Sabelino as primary union organizers at the facility. Moreover, McClain, Respondent's only credible witness, testified that she knew that Sabelino wore a union lanyard and buttons. McClain's knowledge of Sabelino's union activities is imputed to Respondent to prove employer knowledge. *Red Line Transfer & Storage Co.*, 204 NLRB 116, 116 (1973). Furthermore, I do no credit Gilman's testimony that she did not know whether the allegedly sleeping employees were union supporters since she did not notice any union lanyards or pins but also testified in incredible detail as to how the employees were positioned and claimed to have stood in front of them for some time. Also, Treude spoke to each employee the morning of October 7 to ask about their breaks. It seems inconceivable that Treude would not notice their prounion stance as demonstrated by their lanyards and buttons which they wore every day. Thus, the employer had knowledge of the employees who supported the Union.

In terms of animus, the Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity, or close to the filing of an election petition, may raise an inference of animus and unlawful motive. See *Real Foods Co.*, 350 NLRB 309, 312–313 (2007); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Such an inference applies here. The suspensions and discharges occurred only a couple weeks after the filing of the representation petition and only 1 week prior to the representation election. See *Sheraton Anchorage*, 363 NLRB No. 6, slip op at 24 (2015) (finding that an employee's discharge which occurred 2 months after giving testimony "substantially adverse" to his employer, suggests that the motivation behind his termination was his protected activity, his testimony). Respondent's animus is also demonstrated by its contemporaneous 8(a)(1) violations. See *Austal USA, LLC*, 356 NLRB 363, 364 (2010). As found above, Respondent via Rocha unlawfully interrogated an employee about his preference in the representation election.

I also find Treude's actions of forwarding the photo that Gilman took of Sabelino and Brown to the labor consultants troubling and indicative of animus. Respondent claims that Treude only sent the photo to the labor consultants because of the upcoming representation election and wanting them to be aware of issues in the facility. While that may be true, Treude's actions of including Hunt in his correspondences with his human resources consultant and attorney while discussing the investigation and possible actions to take make little sense as Hunt was not hired to provide disciplinary guidance. Certainly Treude could have informed Hunt of his decision, but instead included Hunt in his decision-making process, receiving input from her. Treude's actions appear motivated by the employees' union activities.

[45] To be protected under Sec. 7 of the Act, the employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." These elements are analytically distinct, and must be analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014).

Respondent also failed to conduct a thorough investigation. Here, Respondent relied upon the statement of Gilman who I found not credible as discussed above. Contrary to Respondent's version of events, I do not find that the credible evidence establishes that the discriminatees were asleep for "at least 15-20 minutes" (R. Br. at 12). Both Metellus and Bernales denied sleeping during this time period, but instead took care of their patients. Brown and Sabelino admitted to sleeping which was during their break. Respondent failed to produce any evidence that supports Gilman's claim that all the employees slept at the same time. Respondent questioned other employees, but failed to ask these employees if they actually worked the night shift of October 6 and 7. It is misleading for Respondent to claim that it made efforts to find other witnesses but no witnesses were found (R. Br. at 19). The lack of witnesses may be attributed to no witnesses observing the employees sleeping. Furthermore, Respondent failed to question any other supervisor who worked the same night shift. Instead, Respondent relied upon one supervisor's version of events. Respondent's actions show that Treude sought to suspend and terminate these employees almost immediately without fully investigating what occurred.

Respondent also acted disparately which supports an inference of animus and discriminatory motivation. No other employees had been suspended and discharged for the same or similar allegations. In a similar situation in 2009 where an employee allegedly slept on duty, Respondent did not discipline this employee even though there too was a picture of the sleeping employee. No other employee could confirm that the employee was not on break. Other employees were questioned but no one confirmed that the employee slept while on duty. Thus, Respondent concluded that the employee should not be disciplined due to lack of evidence. Also 1 week prior to the events at issue in his matter, one of Respondent's supervisors also reported employees sleeping during the night shift but that could have been during the employees' breaktime. However, Treude failed to investigate or follow up on this allegation, laying blame on Nobleza. Treude singularly focused on Metellus, Bernales, Brown, and Sabelino and one can only conclude it was due to their union activity.

Respondent argues that they never faced a situation where all 4 employees in a station were asleep at the same time which created grave danger to its patients and for which there are no comparator disciplinary investigations or actions. The evidence, though, does not support this claim. Gilman's failure to wake the employees or question the other stations undermines Respondent's claims that the employees were all sleeping for an extended period of time.

Having found that the General Counsel has proven that the employees' union activity was a motivating factor for Respondent's suspensions and terminations of these employees, the burden shifts to Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of union activity. *Austal USA*, supra.

Respondent claims that it would have suspended and terminated the employees regardless of union activity due to the "brazen" nature of the discriminatees' conduct during the night shift (R. Br. at 20–22). However, as I have credited, only two employees, Sabelino and Brown, were sleeping during their 10-minute break during this shift. I do not credit Gilman's testimony that she observed these employees for up to a few minutes while they slept nor do I credit her testimony that they slept with pillows. The picture shows a white object behind one of the employee's heads but the picture does not definitively show a pillow. Respondent claims that with all employees sleeping on one station, the employees created a "totally unacceptable potential for harm" (R. Br. at 22). However, if the employees created such a danger, then the question remains as to why Gilman did not act immediately. Gilman's failure to act proactively undermines Respondent's claims. In considering Respondent's explanation, Respondent must "persuade that the action would have taken place absent conduct by a preponderance of the evidence." *Weldun International*, *Inc.,* 321 NLRB 733 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). I find that Respondent failed to prove that it would have taken the same adverse actions in the absence of union activity. Significantly, Treude acknowledges that only 1 week prior, another supervisor at Respondent claimed that more than one employee was sleeping during the night shift but Respondent never investigated this claim. Instead, Respondent claimed that the employees may have been on break. When faced with the same allegation 1 week later with known union supporters, Treude decided to suspend and terminate them, with the termination occurring 2 days before the election.

With regard to animus, Respondent claims that the General Counsel's reliance upon its union opposition campaign to demonstrate animus is prohibited under Section 8(c) of the Act which states that the expression of opinion "shall not constitute or be evidence of an unfair labor practice […] if such expression contains no threat of reprisal or force or promise of benefit." This argument is misplaced. In fact, the Board repeatedly has permitted dependence upon statements of an employer that demonstrates its opposition to unionization of its employees or in general to unions, even where the statements are protected under Section 8(c). *Norton Audubon Hospital*, 338 NLRB 320 fn. 1 (2002); *Tim Foley Plumbing Service*, *Inc.,* 337 NLRB 328, 329 (2001); *Stoody Co.*, 312 NLRB 1175, 1182 (1993); *Ross Stores*, *Inc.,* 329 NLRB 573, 576 (1999), enfd. in relevant part, 235 F.3d 669, 675 (D.C. Cir. 2001).[46] Moreover, even without such evidence, the outcome would remain. Treude's false testimony about the purpose of the labor consultants as well as Respondent's witness' lack of candor about the purpose of the antiunion campaign speaks volumes.

[46] As noted by administrative law judge Steven Fish in *First Transit, Inc.*, Case 28-CA-22431 (2010) (not reported in Board volumes), many Circuit Courts have disagreed with the Board, concluding that the Board cannot rely on statements protected by Section 8(c) of the Act. *NLRB v. Lampi, LLC*, 240 F.3d 931, 936 (11th Cir. 2001); *Medeco Security Locks v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998); *Carry Companies of Illinois v. NLRB*, 30 F.3d 922, 927–928 (7th Cir. 1994); see *Ross Stores v. NLRB*, 235 F.3d 669, 675–676 (D.C. Cir. 2001) (Henderson, J., concurring). And some Circuit Courts agree with the Board. *Orchard Corp. v. NLRB*, 408 F.2d 341, 342 (8th Cir. 1969); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473–1477 (6th Cir. 1993). Regardless of the split in the Circuits, I am bound by Board law.

In sum, Respondent violated Section 8(a)(3) and (1) when it suspended and terminated Metellus, Brown, Sabelino, and Bernales.

D. Respondent Used Rodriguez as a "Pawn in an Unlawful Design" When Treude Suspended and Terminated her Thereby Violating Section 8(a)(3) and (1) of the Act

The General Counsel amended the complaint at the hearing to include an allegation that Respondent unlawfully suspended and terminated Rodriguez.

The Board has held that when an employer takes an adverse action against an employee who is not a union supporter because the employer could not otherwise justify taking the same action against a union supporter, the nonunion supporter employee is being used as a "pawn in an unlawful design" and the actions against both employees is unlawful. *Corliss Resources, Inc.,* 362 NLRB No. 21, slip op. at 4 (2015) (citing *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986)).

Here, Rodriguez' position on the Union is unknown, but regardless, Respondent chose to treat her the same as the other discriminatees. As discussed above, Respondent unlawfully suspended and terminated the other four discriminatees, and consciously chose not to consider any other disciplinary actions against Rodriguez for fear of diluting its argument against the other discriminatees. Despite claiming that he did not read Albert's email recommendations, Treude exactly followed Albert's advice. Therefore, because Rodriguez was allegedly sleeping during the same time period as the 4 prounion employees, Respondent suspended and terminated Rodriguez as well in order to "cover" its unlawful suspension and termination of the other 4 employees to discourage employees from supporting the Union which violates Section 8(a)(3) and (1) of the Act. *Dawson Carbide Industries*, supra.

CONCLUSIONS OF LAW

1. Respondent, Novato Healthcare Center, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees, including Narvius Metellus, on October 4, Respondent violated Section 8(a)(1) of the Act.

4. By suspending Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez on October 7, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez on October 12, Respondent violated Section 8(a)(3) and (1) of the Act.

6. All other allegations of the complaint are dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having discriminatorily suspended and discharged Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, and such expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), Respondent shall compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order, file with the Regional Director for Region 20 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. at 13.

The General Counsel requests that I order Respondent to reimburse the discriminatees "consequential economic harm" that they suffered as a result of Respondent's unlawful suspensions and discharges (GC Br. at 57–62). However, I cannot order such a remedy and must follow existing Board precedent. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

Respondent, Novato Healthcare Center, Novato, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interrogating employees, including Narvius Metellus, about their union sympathies.

(b) Suspending employees Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for engaging in protected concerted activity or based on unlawful motivation.

(c) Discharging employees Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for engaging in protected concerted activity or based on unlawful motivation.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of the Board's Order, offer Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed.

(b) Make Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days of the date of the Board's Order, remove from its files any reference to Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez' suspensions and terminations and within 3 days thereafter, notify each individually in writing that this has been done and that the discipline will not be used against them in any way.

(e) Within 14 days after service by the Region, post at its facility in Novato, California, the attached notice marked "Appendix"[48] on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. April 20, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union sympathies.

WE WILL NOT suspend employees Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez due to their protected concerted activity or as a disguise for our unlawful motivation.

WE WILL NOT discharge employees Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for engaging in protected concerted activity or based on unlawful motivation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL immediately offer Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez reinstatement to their former position, and if that job no longer exists, to a substantially equivalent position, without any loss to their seniority rights or any other privileges, and WE WILL immediately make Rolando Bernales, Arlene Waters

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez whole with interest, compounded on a daily basis, for the bonuses, dividends, wages, and benefits they lost because we suspended and fired them, including reasonable search-for-work and interim employment expenses.

WE WILL within 14 days, remove from our files, any and all records of the suspensions and discharges of Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez, and WE WILL within 3 days thereafter, notify Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez in writing that we have taken this action, and that the materials removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

WE WILL compensate Rolando Bernales, Arlene Waters Brown, Narvius Metellus, Angel Sabelino, and Gonzala Rodriguez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

NOVATO HEALTHCARE CENTER

The Board's decision can be found at www.nlrb.gov/case/20-CA-168351 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.